Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

ANWAR HADDAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Under the due process clause and right to a fair trial, must a trial court grant a criminal defendant's request that a "neutralizing" or "no inference" jury instruction be given when a witness invoked his Fifth Amendment privilege against self-incrimination out of the jury's presence?

(2) If failure to grant the requested jury instruction is constitutional error, can such error be considered harmless?

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PRELIMINARY STATEMENT

Petitioner, the State of Louisiana, seeks a writ of certiorari to review the judgment of the Louisiana Supreme Court. The Louisiana Supreme Court's decision makes an unwarranted extension of federal constitutional law that will effect every criminal case in which a witness refuses to testify. The court held that the defendant's constitutional right to a fair trial required the trial judge to give a requested "no inference" jury instruction for a witness who invoked his privilege not to testify outside of the jury's presence.

OPINIONS BELOW

The Louisiana Supreme Court opinion[1] and denial of rehearing[2] are reported at *State v. Haddad*, __ So. 2d __, (La. 2/29/2000), *reh'g denied*, __ So. 2d __, (La. 5/2/2000). The Louisiana Fifth Circuit Court of Appeal opinion[3] is reported at *State v. Haddad*, 733 So. 2d 622, (La.App. 5 Cir. 3/30/99). Pertinent portions of the trial record are included herein.[4]

STATEMENT OF JURISDICTION

The judgment of the Louisiana Supreme Court was entered on February 29, 2000.[5] On May 5, 2000, the Louisiana Supreme Court entered an order denying

1. Appendix A.

2. Appendix B.

3. Appendix C.

4. Appendix D.

5. Appendix A.

Petitioner's timely petition for rehearing.[6] The jurisdiction of this Court to review the ruling of the Louisiana Supreme Court is invoked under *Michigan v. Long*.[7]

The defendant raised only federal constitutional grounds for his claims before the Louisiana Supreme Court and the lower courts.[8] Moreover, the Louisiana Supreme Court's opinion contains no "plain statement" that its decision rests on state law. The opinion does not mention the Louisiana Constitution, a Louisiana statute or a Louisiana case. The Louisiana Supreme Court determined that the requested instruction was a request for a jury instruction rather than an admonishment, and therefore, may be reviewed pursuant to this Court's holding in *James v. Kentucky*.[9]

Further, the Court has jurisdiction by 28 U.S.C. § 1257 and Rules 10(b) and (c) of this Court.

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6. Appendix B.

7. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476-77, 77 L. Ed. 2d 1201 (1983). In *Long*, the Court held that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," we require that it contain a " 'plain statement' that [it] rests upon adequate and independent state grounds," *Id.* at 1040, 1042, 103 S. Ct. at 3476, 3477, otherwise, "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041, 103 S. Ct. at 3476.

8. *See Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 1190 (1995) (adhering to the standard adopted in *Michigan v. Long*).

9. In *James v. Kentucky*, 466 U.S. 341, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984), the Court held that only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a criminal defendant's Sixth Amendment right to present a defense, right to due process and right to a fair trial.

The Sixth Amendment provides that the defendant has the right "[i]n all criminal prosecutions . . . to be confronted with the witnesses against him."

The Fourteenth Amendment states in pertinent part that a state shall not "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Louisiana Supreme Court interpreted the federal constitution to grant a criminal defendant a new constitutional right based on a *witness's* silence. The court decrees that a defendant's right to a fair trial is violated if the defense requests, and the trial court refuses to give, a "no inference" jury instruction for the failure of a witness to take the stand when the witness invokes his privilege not to testify out of the jury's presence.

The decision is an unwarranted extension of federal constitutional law. It lacks any basis in federal jurisprudence.

This decision will affect every criminal case in which a witness fails to testify because it may require the trial judge to confect and give the requested instruction whenever any witness invokes the Fifth Amendment privilege.

A. FACTS[10]

Anwar Haddad was a passenger in an automobile that was stopped by Sgt. Brady Buckley, who testified at trial that the defendant's car was proceeding in the wrong direction on a one-way exit ramp to the Interstate 10 Service Road. After the car stopped, the officer used his PA system to order the driver, Lionel Smith, out of the car. While the officer ordered Smith to walk towards him, the defendant remained in the front passenger seat of the car. When Smith reached the police unit, he volunteered that he had no driver's license or identification and that he did not know where the registration was. Sgt. Buckley conducted a safety pat-down, and then he and Smith walked back to the car to look for the registration. As they approached, Sgt. Buckley observed the defendant pull a gun from the waistband of his pants and point it at the officer.

Pursuant to his police training, Sgt. Buckley drew his weapon and ordered the defendant to "freeze." In response, the defendant dropped the gun onto the floorboard in front of him. In compliance with police procedure, the officer used Smith as a human shield and made his way back to the police unit and secured Smith in the back seat of the unit. Sgt. Buckley then ordered the defendant to exit the vehicle and secured him in the police unit. Sgt. Buckley returned to the passenger side of the vehicle and retrieved a loaded semi-automatic handgun from the floorboard that was shoved under a shirt. The defendant was arrested for possession of a firearm by a felon. Smith was issued traffic citations only.

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10. The facts are compiled from the Louisiana Fifth Circuit's and Louisiana Supreme Court's opinions. Appendix C and A, respectively.

Samir Haddad, the defendant's brother, testified that the gun was Samir's, and that he used it for his own protection. The car belonged to Samir's girlfriend, Andrea. Samir rode in the car the night before with other friends and testified that he inadvertently left the gun under the seat.

The defendant testified that Smith picked him up that morning in Andrea's car, and they ran errands together for two hours before the stop. According to the defendant, when Smith exited the vehicle, he tossed the gun to the defendant and advised him to run. Defendant knew it was illegal for him to have a gun, so he grabbed the gun and put it on the floorboard in plain view. According to the defendant, Sgt. Buckley only learned about the gun when the defendant informed him of its existence while the defendant was still seated in the front seat of Smith's car. The defendant alleged that Sgt. Buckley then left him with the loaded gun in the front seat of the car while the officer walked Smith back to the police unit.

B. PROCEEDINGS BELOW

Anwar Haddad was convicted by a jury of possession of a firearm by a person convicted of a felony, a violation of LSA-R.S. 14:95.1.[11] During trial, the defense orally requested a jury charge that a witness, Lionel Smith, "[was] here to testify, and that, due to a ruling of the court, . . . was unable to testify to today."[12] The request did not contain any "no

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11. Appendix C.

12. Appendix D.

inference" or similar limiting language such as the jury is not to speculate why the witness refused to testify.

The Louisiana Supreme Court reversed the conviction.[13] Although the Supreme Court held that the Sixth Amendment Confrontation Clause's right to confrontation was not implicated when Smith invoked his privilege not to testify outside of the jury's presence, the defendant, nevertheless, was entitled under his right to a fair trial and "existing federal and state jurisprudence"[14] to have a requested "neutralizing" jury instruction.[15] In determining that the failure to give the instruction was not harmless error, the Louisiana Supreme Court noted that the defendant's account of the incident differed from the arresting officer's account, that Smith's name was mentioned during the trial, and importantly, "[t]he fact that the first trial resulted in a hung jury after Smith invoked his Fifth Amendment Privilege in the presence of the jury illustrates the impact of Smith's presence or absence at trial."[16] Therefore, the error was not harmless, the court said, because the guilty verdict was attributable to the trial court's refusal to give the requested instruction.

Justice Knoll, joined by Justice Traylor, dissented. Justice Knoll reasoned:

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13. Appendix A.

14. There is no Louisiana jurisprudence, and the out-of-state jurisprudence clearly is contrary to the court's holding.

15. Appendix A, La.S.Ct. p. 15a.

16. Appendix A, La.S.Ct. p. 17a.

> By requiring a special neutralizing instruction, the majority is allowing the defendant, in essence, to accomplish indirectly that which we have repeatedly held could not be done directly, i.e., an attempt to substantially put before the jury information that a witness has invoked his Fifth Amendment privilege to testify. Nothing in the proposed neutralizing instruction prevents speculation on the part of the jury. Instead, by highlighting the absence of this witness, the instruction alerts the jurors to this omission and fosters the speculation that the majority attempts to remedy.[17]

Rehearing was denied on May 5, 2000, with assigned reasons.[18]

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD CONSIDER THIS CASE BECAUSE IT PRESENTS AN UNWARRANTED EXTENSION OF CONSTITUTIONAL LAW

The Louisiana Supreme Court's decision creates a new constitutional right based on a witness's silence. It extends the "no inference" jury instruction mandate in *Carter v. Kentucky*[19] to give the defendant a constitutional right to have

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17. Appendix A, La. S. Ct. pp. 20a-21a.

18. Appendix B.

19. *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

the jury informed that a witness invoked his privilege not to testify whenever the defendant requests a "neutralizing" instruction.

This Court has not previously addressed the constitutional questions presented. The Court's decisions in *Carter v. Kentucky* and *James v. Kentucky*, clearly reserved the questions in the instant case.

In *Carter v. Kentucky*,[20] the Court held that a trial judge must, if requested to do so, instruct the jury not to draw an adverse inference from the *defendant's* failure to take the stand. The Court set aside Carter's conviction because the defendant's Fifth Amendment right to remain silent must be fully effectuated. *Carter* declined to consider whether the refusal to give a "no inference" instruction can be harmless because the issue was not properly presented or considered by the Supreme Court of Kentucky. In *James v. Kentucky*,[21] the Court held that when the request is for an admonishment rather than a jury instruction, it is for the state court to decide whether a *Carter* error is harmless.

In the instant case, the trial judge refused to give the requested jury instruction based on a *witness's* failure to testify where the witness invoked his privilege not to testify out of the jury's presence. Both the Louisiana Fifth Circuit Court of Appeal and the Louisiana Supreme Court treated the defense request as a request for a jury instruction and addressed whether the error was harmless.

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20. *Id.*

21. *James v. Kentucky*, 466 U.S. 341, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984).

The extension of *Carter's* rule to a witness's failure to testify is unwarranted. The Louisiana Supreme Court confuses the "no inference" mandate in *Carter v. Kentucky* regarding a *defendant's* decision not to testify with some imagined rule that applies with equal force to a *witness* who is unavailable to either party because that witness has invoked his privilege not to testify. It is well-settled that the constitutional guarantee of confrontation and right to present a defense is satisfied by the witness appearing and asserting his privilege not to testify out of the jury's presence.[22]

The Louisiana Supreme Court's failure to articulate which constitutional amendment it relies upon to support its holding, coupled with the court's vague analysis of the fair trial violation on which the opinion is based, has great significance. It presents a huge new confounder in state and federal criminal cases by serving to increase the strategic games played by the parties without enhancing the truth-finding function of the trial. As a result, the ruling undermines the certainty of the verdict.

The decision mutilates the rule that a witness is not permitted to take the witness stand solely to invoke his privilege not to testify absent extraordinary circumstances.[23] Inferences from a witness' refusal to answer add critical weight to one side of the case in a form not subject to cross-

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22. *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963); *United States v. Lacouture*, 495 F.2d 1357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1053, 95 S. Ct. 631, 42 L. Ed. 2d 648 (1974).

23. *See Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

examination, and thus unfairly prejudiced the defendant.[24] The Louisiana Supreme Court simply created a new constitutional mandate, quoting various old federal and state cases and a military case which offer no support and are bereft of constitutional analysis or foundation, and then decreeing that a defendant's right to a fair trial is violated by a trial court's refusal to give a jury instruction that effectively informs the jury that a witness invoked his privilege not to testify.

Additionally, the Louisiana Supreme Court's decision decimates the well-settled jurisprudential rule that it is not the number of witnesses but the credibility of the testifying witnesses, that determines the fact-finding process of the jury resulting in a determination of guilt or innocence. A guilty verdict may be sustained if the fact-finding jurors can accept as true the testimony of just one witness.[25] In the instant case, the jury heard the testimony of two eyewitnesses, including the defendant's self-serving testimony that the absent witness was the guilty party. The jury's function is to determine the relative credibility of the witnesses called to trial. Nevertheless, the Louisiana Supreme Court reasoned it would be unjust to penalize the defendant for an independent decision made by a party not on trial who could have helped the defense. The flaw in this argument is that the record is completely devoid of even a hint as to what the witness might say or what he actually observed.[26]

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24. *Id.* at 187, 83 S. Ct. at 1155.

25. *See United States v. Kelley*, 140 F.3d 596, 607 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 247 (1998); *See, e.g., State v. Silman*, 663 So. 2d 27, 35 (La. 1995).

26. The court supported its decision by determining that the missing witness was a "key" witness. To show that the preclusion (Cont'd)

The prejudicial effect of the requested instruction is exacerbated by the form of the instruction. The instruction did not contain "no inference" language, and therefore permitted the jury to speculate about the defendant's (and the witness's) guilt or innocence. As a result of the biased instruction which caused ineradicable interest by the jury, reviewing courts will have an increasingly difficult time determining whether an instruction that was actually given impermissibly shifted the state's burden of proof to allow the jury to determine a defendant's guilt or innocence based on inadmissible facts. Thus, it creates uncertainty in the verdict and whether the State carried its burden of proof on the evidence presented at trial.

II.

THE DECISION OF THE STATE SUPREME COURT IS IN CONFLICT WITH THE LAST 15 YEARS OF DECISIONS OF FEDERAL CIRCUIT COURTS AND WITH OTHER STATES' JURISPRUDENCE

The Sixth Amendment of the United States Constitution and Louisiana Constitution Art. I, § 16, guarantee an accused

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(Cont'd)
of a defense witness resulted in a fundamentally unfair trial, defendant must establish the materiality of the excluded evidence to the presentation of the defense. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S. Ct. 3440, 3449, 73 L. Ed. 2d 1193 (1982) (citing *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941)). Both the defendant and Sgt. Buckley testified at trial. It cannot be determined from reviewing the record that Smith's testimony would be material or exculpatory because the defense failed to proffer Smith's proposed testimony.

in a criminal prosecution the right to present a defense.[27] The essential purpose of the confrontation guarantee is to secure the opportunity for cross-examination.[28]

The denial of due process in a state criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice. [The court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[29]

Although the Louisiana Supreme Court held that the defendant's Sixth Amendment guarantee of confrontation was satisfied when the witness invoked his privilege not to testify out of the jury's presence, it nevertheless, found that a defendant's right to present a complete defense and have a fair trial were impinged by not giving the requested instruction, which in this instance, did not contain a "no inference warning.[30] The Louisiana Supreme Court's decision hinges on the bizarre logic that if a witness fails to

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27. *Washington v. Texas*, 388 U.S. 14 (1967); *State v. Hamilton*, 441 So. 2d 1192 (La. 1983).

28. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

29. *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941).

30. Justice Kimball, concurring in the court's denial of rehearing, found that the requested instruction did not contain a "no inference" warning, however, because the majority's opinion indicated that such an instruction should contain "no inference" language, rehearing was denied. Appendix B.

testify, the jury will necessarily conclude that the witness's absence means that the defendant is guilty.

Moreover, the Louisiana Supreme Court's decision is unsupported by federal, state and military case law, by Louisiana statutory law, and by the Louisiana and United States Constitutions. No authority mandates a "no adverse inference" or "neutralizing" jury charge for a non-testifying witness where the jury is unaware of the reason for the witness's absence.

The principles enunciated in *Carter v. Kentucky*,[31] are narrowly applied by the federal circuit courts.[32] A "no adverse inference" instruction is given only when it is the defendant's right to silence that is impinged.[33] Additionally, a trial court's failure to give the instruction may be harmless error.[34] Thus,

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31. *Carter v. Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981).

32. *See United States v. Laboy-Delgado*, 84 F.3d 22 (1st Cir. 1996); *United States v. Justus*, 162 F.3d 1157 (4th Cir. 1998); *United States v. Lampton*, 158 F.3d 251 (5th Cir. 1998); *United States v. Senn*, (129 F.3d 886 (7th Cir. 1997); *Harden v. Garcia*, 164 F.3d 630 (9th Cir. 1998); *United States v. Chirinos*, 112 F.3d 1089 (11th Cir. 1997); *United States v. Catlett*, 97 F.3d 565 (D.C. Cir. 1996).

33. *See United States v. Imran*, 964 F.2d 1313 (2nd Cir. 1992); *Beathard v. Johnson*, 177 F.3d 340 (5th Cir. 1999); *United States v. Lyon*, 959 F.2d 701 (8th Cir. 1992); *United States v. Brailie*, 99 F.3d 1147 (9th Cir. 1996); *United States v. Adams*, 914 F.2d 1404 (10th Cir. 1990).

34. *United States v. Ramirez*, 810 F.2d 1338 (5th Cir. 1987) (harmless error analysis available for failure to give no adverse (Cont'd)

it is well-settled that *Carter* is inapplicable to a non-testifying witness.

The Louisiana Supreme Court's reliance on the 1970 "leading case on the issue,"*Bowles v. United States*,[35] is misplaced. *Bowles* held where a witness's unavailability results from an invocation of the privilege against self-incrimination, and the witness is unavailable to both parties, the court's refusal to give an absent witness instruction is proper.[36] In dicta, the *Bowles* court opined that if either counsel had requested it, which they did not, "the trial judge *could* properly have given a neutralizing instruction, one calculated to reduce the danger that the jury will in fact draw an inference from the absence of such a witness."[37]

No federal circuit in more than fifteen years,[38] including the Court of Appeals for the District of Columbia, has relied

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(Cont'd)
inference instruction); *United States v. Brailie*, 99 F.3d 1147 (9th Cir. 1996) (failure to give no adverse inference instruction subject to harmless error).

35. *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970) (en banc).

36. *Id.* at 541-42.

37. *Id.* at 542 (emphasis added).

38. *See United States v. Martin*, 526 F.2d 485, 487 (10th Cir. 1975) (giving a "no inference" non-testifying witness instruction was not reversible error); *United States v. Lacouture*, 495 F. 2d 1237 (5th Cir. 1974) (upholding the trial court's failure to give a non-testifying witness neutralizing instruction); *United States v. Griffin*, (Cont'd)

on the dicta in *Bowles* as authority for requiring a "neutralizing" instruction or reversing a conviction because the instruction was not given, where a witness is absent as a result of invoking his Fifth Amendment privilege and the jury is unaware of the reason for the witness' absence. Instead, the federal circuits note that any alleged prejudice arising from challenges for failure to give the instruction is cured by a jury instruction that the government bears the burden of proof,[39] which was given in the instant case. Furthermore, federal circuit courts have uniformly rejected the requirement of a "neutralizing" instruction when the defendant has testified, as the defendant in the instant case did.

Nevertheless, the Louisiana Supreme Court seized on dicta to mandate that a "no inference" instruction must be given at the defendant's request when a witness exercises his privilege not to testify.

(Cont'd)

66 F.3d 68, 71 (5th Cir. (La.) 1995) (rejecting the defendant's contention that *Bowles* and *Lacouture* suggested that an instruction alerting the jury to a witness's absence is proper when it is requested).

39. *See, e.g.*, *United States v. Garcia-Guizar*, 160 F.3d 511, 522 (9th Cir. 1998); *United States v. Lampton*, 158 F.3d 251, 260 (5th Cir. 1998); *United States v. Salameh*, 152 F.3d 88, 136-37 (2nd Cir. 1998).

CONCLUSION

A criminal defendant is not entitled under any provision of the Constitution to a jury instruction for an absent witness who invoked his privilege not to testify outside of the jury's presence. Neither the Sixth Amendment right to present a defense nor the right to a fair trial are impinged when the jury is not advised of the reasons for a witness's absence by way of a "neutralizing" or "no inference" jury charge and the defendant testifies. Accordingly, the State of Louisiana respectfully requests this Court grant a writ of certiorari on this res nova criminal issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE LOUISIANA SUPREME COURT DATED FEBRUARY 29, 2000

SUPREME COURT OF LOUISIANA

No.99-K-1272

STATE OF LOUISIANA

Versus

ANWAR HADDAD (SENTENCED AS "ANWAR G. HADDAD")

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

JOHNSON, Justice*

Defendant, Anwar Haddad, was convicted in Jefferson Parish pursuant to LSA-R.S. 14:95.1, which makes it unlawful for a convicted felon to possess a firearm or carry a concealed weapon. We granted this writ of certiorari to determine whether the trial court erred in failing to give the jury a "neutralizing instruction" to neutralize any inference jurors might draw from the defendant's failure to call the driver of the vehicle in which he was a passenger at the time of his arrest as a witness at trial. After a review of federal precedents and jurisprudence from other states, we conclude that the defendant was entitled to have the trial court give a neutralizing instruction and that the failure to do so was not harmless error. Accordingly, we reverse the court of appeal's decision and the defendant's conviction, and we remand this case to the trial court for a new trial.

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* Victory, J., not on panel. See Rule IV, Part 2, § 3.

Appendix A

FACTS AND PROCEDURAL HISTORY

The defendant, Anwar Haddad, was a passenger in an automobile which was stopped by Sergeant Brady Buckley, an officer on routine patrol for the Jefferson Parish Sheriff's Office. Officer Buckley testified that as he was traveling on Causeway Boulevard in Metairie, he witnessed a vehicle proceeding in the wrong direction of a one-way exit ramp to the Interstate 10 Service Road. The officer stated that, as he pursued the vehicle, the driver began to make erratic lane changes. At that point, Officer Buckley activated his police lights and siren. The vehicle did not immediately stop, but crossed three lanes of traffic and turned into the parking lot of Lakeside Shopping Center on Veterans Boulevard.

After the vehicle stopped, the driver, who was later identified as Lionel Smith, exited the vehicle immediately. The officer ordered Smith to walk toward him, and the defendant remained in the vehicle in the passenger seat. The officer testified that he approached the vehicle with Smith to look for registration papers. The officer stated that, as he approached the vehicle, the defendant pulled a weapon from the waistband of his pants and pointed it at him.

In contrast to Officer Buckley's testimony, the defendant testified that when Smith stopped the car, Smith tossed the gun to him and told him to run. The defendant also testified that, since he knew it was illegal for him to possess a weapon, when Smith tossed the gun in his lap, he "grabbed it and put it on the floor" and made no attempt to conceal it (Tr. 72-73). The defendant further stated that when Officer Buckley walked to the vehicle to ask him Smith's name, he

informed the officer that there was a gun on the floor of the vehicle. According to the defendant's testimony, the gun remained on the floor of the vehicle, and the officer never saw it in his "possession."[2]

After placing both the driver and the defendant in handcuffs, the officer retrieved the handgun, a loaded .380 Lorcin semi-automatic, from inside of the vehicle. The gun was listed as stolen on the police computer, and both the

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2. To support the conviction of possession of a firearm by a convicted felon, the State must prove beyond a reasonable doubt that: (1) defendant possessed a firearm; (2) defendant was convicted of a prior enumerated felony within the ten-year statutory time limitation; and (3) general intent to commit the offense. *State v. Segure*, 96-1275 (La.App. 4 Cir. 10/1/97), 700 So.2d 1149, and cases cited therein. Possession must be intentional. *Segure*, *supra*, and cases cited therein. General intent is shown when the proof shows that the perpetrator carried on his person a firearm. *State v. Woods*, 94-2650 (La.App. 4 Cir. 4/20/95), 654 So.2d 809, *writ denied*, 95-1252 (La.6/30/95), 657 So.2d 1035. When the perpetrator has not carried the firearm on his person, the State must show that the defendant's intent amounted to an intent to possess rather than a mere acquiescence to the fact that there was a firearm in his presence. *Id.* Mere presence in an area where contraband is found or mere association with an individual found to be in possession of such does not necessarily establish possession. *State v. Viera*, 449 So.2d 644 (La.App. 4 Cir.1984), *writ denied*, 450 So.2d 962 (La. 1984).

Officer Buckley testified that he saw the gun in the defendant's possession, and in fact, the defendant pointed it at him. However, he later testified that he retrieved the gun from the floor of the vehicle and not from the defendant's person. We also note that the defendant was not charged with assault for allegedly pointing a weapon at the police officer.

defendant and Smith were arrested. After it was determined that Haddad had prior convictions, he was charged with possession of a firearm by a convicted felon. LSA-R.S. 14:95.1.

The defendant's brother, Samir Haddad, testified at trial that the vehicle was owned by his girlfriend. He also testified that the handgun found in the vehicle belonged to him and that he had never seen his brother in possession of the weapon. He stated that he had inadvertently left the weapon underneath the seat of the vehicle. The defendant's parents testified that the gun belonged to Samir and that they had never seen it in the defendant's possession.

On May 21, 1998, the defendant was tried by a jury. Lionel Smith took the stand and invoked this Fifth Amendment privilege against self-incrimination, and the jury was unable to reach a verdict.

The defendant was retried on June 24, 1998. Prior to jury selection in the second trial, Lionel Smith was sworn in open court, and his attorney stated for the record that his client had decided to invoke his Fifth Amendment privilege against self-incrimination. The court would not allow Smith to reassert his Fifth Amendment privilege in the jury's presence and excused him. The defendant's attorney objected, arguing that his case would rest primarily on the assertion that it was Smith who possessed the gun at issue and that the defendant would be prejudiced if jurors were allowed to speculate as to why Smith was not called to testify. Defense counsel's objection was noted. During the trial, the defendant's attorney asserted that he was entitled to a

"neutralizing" instruction which would neutralize any inference jurors might draw from his failure to produce Smith as a witness at trial. Defense counsel requested that the jury be informed that Smith "had been called and that, through a ruling of the Court, he would not be permitted to testify, or something to that effect. . . ." (Tr. 85).

The judge ruled that she would give no instruction regarding Smith's failure to testify and gave the following general charge, in pertinent part:

> You must determine the facts only from the evidence presented. The evidence which you should consider consists of the testimony of witnesses and any other evidence which the Court has permitted the parties to introduce.
>
> You are not bound to decide any issue of fact in accordance with the number of witnesses presented on that point. Witnesses are weighed and not counted. The test is no which side brings the greater number of witnesses before you, or presents the greater quantity of evidence, but rather which witnesses and which evidence appeals to your minds as being the most convincing.
>
> The defendant is not required by law to call any witnesses or produce any evidence.

(Tr. 97).

Appendix A

The jury found the defendant guilty as charged. On August 13, 1998, the trial court denied the defendant's motion for a new trial. After the defendant waived statutory delays, he was sentenced to serve ten years at hard labor, without benefit of parole, probation, or suspension of sentence.

The defendant appealed his conviction, and the court of appeal affirmed the trial court's ruling. The court of appeal specifically held that although the trial court did not give a "neutralizing" instruction to the jury, the jury instructions, as a whole, adequately informed the jury that they were to consider only the evidence presented. The court of appeal further held that even if the refusal to give the instruction was erroneous, the error was harmless. *State v. Haddad*, 98-1200 (La.App. 5 Cir. 3/30/99), 733 So.2d 662. The defendant filed an application for certiorari with this court, and by order dated October 15, 1999, we granted his writ application. *State v. Haddad*, 99-1272 (La. 10/15/99), — So.2d —.

DISCUSSION

In his only assignment of error, the defendant argues that the trial court erred by refusing to give a "neutralizing" instruction to the jury regarding the failure of Lionel Smith to testify at trial following a ruling by the court that Smith would not be allowed to testify because he had invoked his Fifth Amendment privilege against self-incrimination.

We note, as a preliminary matter, the State's argument that the requested jury instruction was not preserved for appeal because the defendant failed to comply with the

writing requirement for jury instructions in LSA-C.Cr.P. art. 807, which provides, in pertinent part:

> The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the court.

The state argues that, because defense counsel did not submit the requested charge in writing, the trial court was not required to grant the defendant's request. *See State v. Weems*, 358 So.2d 285 (La. 1978); *State v. Ford*, 608 So.2d 1058 (La.App. 1 Cir. 1992); *State v. Corley*, 97-235 (La.App. 3 Cir. 10/8/97), 703 So.2d 653; *writ denied*, 97-2845 (La. 3/13/98), 712 So.2d 875.

LSA-C.Cr.P. art. 801 provides that a party may assign as error the failure to give a jury charge so long as the objection thereto is made "before the jury retires or within such time as the court may reasonably cure the alleged error." Additionally, in *State v. Henderson*, 362 So.2d 1358 (La. 1978), this court held that when the trial judge entertained numerous oral requests and objections by the defendants, the judge had dispensed with the requirement that special charges be in writing and had tacitly agreed to consider such instructions as orally proposed.

Here, defense counsel objected, on the record, to the court's failure to instruct the jury not to draw any inference

from Smith's failure to testify numerous times during the trial, and the trial court noted his objections. The trial court repeatedly acknowledged those objections. Furthermore, the transcript demonstrates that submission of the requested instruction in writing would have been a futile effort on the part of the defense counsel, since the trial court had already denied his request for a neutralizing instruction at least three times. We hold that by repeatedly noting counsel's objection, the trial court tacitly waived the writing requirement contained in LSA-C.Cr.P. art. 807.

In his brief, the defendant claims that his Sixth Amendment right to present Lionel Smith as a witness in the second trial was abrogated by the trial court's refusal to allow Smith to take the stand. As a general proposition, when faced with resolving the tension between a witness' Fifth Amendment privilege against self-incrimination and a defendant's Sixth Amendment right to present a defense, this court has consistently recognized the witness's right not to incriminate himself. *State v. Brown*, 514 So.2d 99 (La. 1987); *cert. denied* 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988), *reh'ing denied*, 487 U.S. 1228, 108 S.Ct. 2888, 101 L.Ed. 923 (1988); *State v. Edwards*, 419 So.2d 881 (La. 1982); *State v. Mattheson*, 407 So.2d 1150 (La. 1981); *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); *reh'ing denied*, 463 U.S. 1249, 104 S.Ct. 37, 77 L.Ed.2d 1456; *State v. Coleman*, 406 So.2d 563 (La. 1981). Moreover, this court has held that it is impermissible to knowingly call a witness who will claim a privilege, "for the purpose of impressing upon the jury the fact of the claim of privilege." *See State v. Willie*, 559 So.2d 1321 (La. 1990); *reh'ing denied*, 595 So.2d 1149 (La. 1992); *cert denied*, 506

U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992); *reh'ing denied*, 506 U.S. 1016, 113 S.Ct. 645, 121 L.Ed.2d 575, 121 L.Ed. 575 (1992); *State v. Berry*, 324 So.2d 822 (La. 1975), *cert. denied*, 425 U.S. 954, 96 S.Ct. 1731, 48 L.Ed.2d 198 (1976). Federal courts have also rejected a defendant's claim of error based upon the denial of his request that a witness assert his claim of privilege in the presence of the jury. *See United States v. Lacouture*, 495 F.2d 1237 (5th Cir.1974); *cert. denied*, 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974); *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 278 (1963).

We adhere to our holdings in *Willie*, *supra* and *Berry*, *supra*. We hold that the trial court did not err in disallowing Smith to take the stand for the sole purpose of invoking his Fifth Amendment privilege against self-incrimination in the presence of the jury.

The question of whether a defendant is entitled to a "neutralizing" instruction has been raised once before in this state. In *State v. Gerard*, 96-366 (La.App. 5 Cir., 11/14/96), 685 So.2d 253, the defendant alleged that the trial court erred by failing to instruct the jury regarding a co-defendant's invocation of his Fifth Amendment privilege. However, the court deemed the issue waived because of defense counsel's failure to address the issue in actual argument. The question presents a *res nova* issue in this court. Therefore, it is necessary to review jurisprudence in other jurisdictions.

Many federal and state courts have addressed the issue and have held that in circumstances in which the defendant is denied his request that a witness take the stand to assert

his claim of privilege, a "neutralizing" instruction should be given to the jury at the defendant's request.

In the leading case on this issue, *Bowles v. United States*, 439 F.2d 536 (D.C. en banc, 1970); *cert. denied*, 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533 (1970), the court upheld the trial court's refusal to permit the defendant to call a witness to the stand after it had been ascertained, outside of the presence of the jury, that the witness intended to intended to invoke his privilege against self-incrimination. Although defendant's counsel did not request a neutralizing instruction, the court stated:

> [the] trial judge could properly have given a neutralizing instruction, one calculated to reduce the inference from the absence of such a witness. . . . Had either counsel requested the court to instruct the jury that they should draw no inference from [the witness's] absence because he was not available to either side, it would have been error to refuse this instruction.

Id. at 542.

In *United States v. Martin*, 526 F.2d 485 (10th Cir. 975), the trial judge refused to allow the defendant to put a witness on the stand to compel the witness to invoke his Fifth Amendment privilege in the presence of the jury. However, the trial court later gave the jury a neutralizing instruction, stating, "the jury may not draw any inference from the fact that [the witness] did not appear as a witness in this case." The court of appeal determined that the instruction

"was proper and served to put the entire matter in context." *Id.* at 487.

Courts in other states have also addressed the issue presented herein and have determined that a "neutralizing" instruction, when requested, is proper in a situation in which a witness asserts his Fifth Amendment privilege before trial and is therefore unavailable to testify.

In *State v. Kirk*, 72 Ohio St.3d 564, 651 N.E.2d 981 (Ohio 1995), *cert. denied*, 516 U.S. 1097, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996), the court held that when a defendant is unable to call a witness to the stand because of the witness's intention to assert the Fifth Amendment privilege against self-incrimination, the defendant is entitled to request an instruction that the jury should draw no inference from the absence of the witness because the witness was not available to either side. The court further stated, "Such an instruction is intended to reduce the danger that the jury would, in fact, draw an inference from the absence of a witness who could corroborate the defendant's testimony." *Id.* at 984.

In *State v. McGraw*, 129 N.J. 68, 608 A.2d 1335 (N.J. 1992), the New Jersey Supreme Court held that, the trial court was not required to give an instruction that the defendant was entitled to a favorable inference from a witness's refusal to testify based on the invocation of his Fifth Amendment privilege. However, the court decided that trial court was required to give an unsolicited instruction that the jury was not draw no inference from the witness's failure to testify. The court stated that such an instruction is

"aimed at foreclosing an unfavorable inference that could counter whatever exculpatory evidence is presented through other witnesses available for cross-examination by the prosecution." *Id.* at 1340.[3]

In *People v. Dyer*, 425 Mich. 572, 390 N.W.2d 645 (Mich. 1986), the court stated:

> Where a party does not produce or call a co-defendant or a witness to substantiate a claim of innocence or guilt, the jury may draw an adverse inference from the absence of this evidence. A neutralizing instruction explains to the jurors that they may not draw an inference from the absence of certain witnesses or engage in speculation about the possible nature of their testimony. Such an instruction, while not mandatory, should be given when requested to avoid prejudice.

In *Faver v. State*, 393 So.2d 49 (Fl.Ct.App. 1981), the court affirmed the defendant's conviction because he failed to request a neutralizing instruction. However, the court stated:

> We note parenthetically that if counsel had requested a jury instruction stating that [the witness] was not available to either side as a

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3. The court ultimately affirmed the defendant's conviction because there was no showing that the witness's testimony would corroborate the defendant's version of the events.

> witness and that the jury should draw no inference from his absence, such an instruction would have been proper.

Id. at 49.

In *People v. Thomas*, 68 A.D.2d 450, 417 N.Y.S.2d 278 (N.Y.App.Div. 1979), after another witness testified regarding a potential witness's purported prior self-incriminating remarks, the defense counsel did not attempt to renew a motion to call the witness to the stand or request to have the witness's absence explained to the jury. The court held that the trial court did not err by failing to give the neutralizing instruction explaining the potential witness's failure to testify. Although the Court of Appeals[4] affirmed the Supreme Court's ruling, that court stated:

> Although we conclude that no such explanatory instruction was required under the circumstances of this case, we hasten to add that there may be instances in which a proper neutralizing instruction is necessary in order to correct any misimpression that may arise in the jurors' minds from the witness' absence at trial.

People v. Thomas, 51 N.Y.2d at 467, 434 N.Y.S.2d 941, 415 N.E.2d 931.

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4. The name "Supreme Court" is misleading. The Supreme Court is the court of original jurisdiction in the State of New York. *See*, N.Y. Const. art. VI, § 7.

Appendix A

The Pennsylvania Supreme Court treated the same issue in *Commonwealth v. Greene*, 445 Pa. 228, 285 A.2d 865 (Pa. 1971). Although the court ultimately held that the trial court's refusal to allow a defense witness, who had invoked his Fifth Amendment right against self-incrimination prior to trial, to take the stand was proper, the court went on to note that the trial judge, if requested, should have given a neutralizing instruction calculated to reduce the danger that a jury might draw an inference from the absence of such a witness.

The United States Court of Military Appeals has also dealt with this issue. That court found that the lower court committed reversible error by refusing to accept proffered testimony and give an appropriate neutralizing instruction where a key defense witness was unavailable to testify because of a likely invocation of his Fifth Amendment right against self-incrimination. *See United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

At least one state, the State of Nebraska, has codified the procedure to give a neutralizing instruction. Neb.Rev.Stat. § 27-513(3) (Reissue 1995) provides:

> Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

The State argues that there is no authority which requires the trial court to give a "no adverse inference" or "missing witness" jury instruction when a non-testifying witness

invokes his right not to testify. In support of its contention that an "adverse inference" instruction is to be given only when the defendant's right to remain silent has been infringed, the State cites as authority *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 21 (1981). The State concedes in its brief that Carter deals with the defendant's failure to testify and not a key witness's invocation of his Fifth Amendment privilege. We conclude that Carter is wholly inapplicable to the issue presented in the instant case.

In the case *sub judice*, the defendant's counsel requested, at least three times, that the trial court give an instruction concerning the failure of Lionel Smith to be called as a witness, and the trial court denied the request. The court of appeal concluded that, read as a whole, the instructions adequately informed the jury that they were only to consider the evidence presented. However, nothing in the general charges specifically instructed the jury not to draw any negative inferences from Smith's failure to testify. The charges given by the trial court were much too general and non-specific to compensate for defendant's inability to call a witness as important to his case as Lionel Smith. Under existing federal and state jurisprudence, we hold the requested instruction was correct, and the trial court erred in not giving the instruction.

The court of appeal further concluded that, even if the trial court erred by failing to give the requested neutralizing charge, the error was harmless. Harmless error analysis begins with the premise that the evidence is otherwise sufficient to sustain the conviction if viewed from the

perspective of a rational factfinder and asks whether beyond a reasonable doubt the error could not have contributed to the verdict actually returned by the defendant's jury. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In that case, the United States Supreme Court stated:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Id. at 2081. We hold that, under the facts presented herein, the trial court's refusal to inform the jurors that they could draw no inference from Smith's failure to testify cannot be construed as harmless error, since it cannot be established beyond a reasonable doubt, that the guilty verdict was surely unattributable to the error.

In this case, there were three witnesses to the incident in question: the defendant, the arresting officer, and Lionel Smith. The defendant's entire defense rested on the notion that it was Smith, not the defendant, who actually possessed the gun found in the vehicle. The defendant's account of the incident directly contradicted the arresting officer's account. The jury had heard testimony that Lionel Smith was present at the time of the incident. Furthermore, in its closing argument, the State made references to Smith. The District Attorney made the following statements in his closing remarks:

> Lionel Smith gives the wrong name because he's got attachments out for him, and he knows it. And what else is interesting? Lionel Smith can have a gun because he is not a convicted felon. . . . So why is Lionel Smith going to dump the gun? Is that reasonable. Ladies and gentlemen, that's what it comes back to. When you go in the jury room, ask yourself, "What's reasonable, and who do I believe? Who do I believe? . . ."

(Tr. 93-94). As the defendant points out, such statements made by the District Attorney asks the jury to consider questions that only Lionel Smith could answer, had he been called to testify. It would be natural for the jury to speculate as to why the defendant's friend, the only person whose testimony could corroborate the defendant's testimony, was not called to testify. The fact that the first trial resulted in a hung jury after Smith invoked his Fifth Amendment privilege in the presence of the jury illustrates the impact of Smith's presence or absence at trial.

CONCLUSION

We find that the trial court committed reversible error when it refused to instruct the jury not to draw any inference from Lionel Smith's failure to testify. Accordingly, we reverse the conviction and sentence and remand this matter to the trial court for a new trial.

Appendix A

SUPREME COURT OF LOUISIANA

No.99-K-1272

STATE OF LOUISIANA

Versus

ANWAR HADDAD (SENTENCED AS "ANWAR G. HADDAD")

KNOLL, JUSTICE, dissenting.

I disagree with the majority's conclusion that the trial court committed reversible error when it refused to issue a special neutralizing instruction to the jury alerting it to Lionel Smith's failure to testify. The defendant was neither entitled to such an instruction nor was the refusal on the part of the trail court reversible error. Accordingly, I respectfully dissent.

The State charged defendant with felon in possession of a handgun. At trial, the jury was presented with the testimony of the arresting officer, Sergeant Buckley, the defendant, and Samir Haddad, defendant's brother. Sergeant Buckley testified that he saw defendant pull the gun from his waistband and point it at him. The defendant testified that when he and Smith were stopped by Sergeant Buckley, Smith tossed the gun to him and told him to run. Finally, Samir testified that the car defendant and Smith were stopped in belonged to his girlfriend, that the gun was his and used for his own protection, and that he inadvertently left the gun under the seat the night before the defendant was stopped.

Appendix A

In charging the jury, the trial court gave the following instructions:

> You must determine the facts only from the evidence presented. The evidence which you should consider consists of the testimony of witnesses and any other evidence which the Court has permitted the parties to introduce.
>
> . . . .
>
> You are not bound to decide any issue of fact in accordance with the number of witnesses presented on that point. Witnesses are weighed and not counted. The test is not which side brings the greater number of witnesses before you, or presents the greater quantity of evidence, but rather which witnesses and which evidence appeals to your minds as being the most convincing.
>
> . . . .
>
> The defendant is not required by law to call any witnesses or produce any evidence.

The majority concludes that this instruction was insufficient and that the trial court should have granted the defendant's request of a special neutralizing instruction. I disagree. For the same reason that defendant had no constitutional right to place Smith on the stand and have him invoke his Fifth Amendment privilege against self-

incrimination in the presence of the jury, Haddad has no right for the trial court to give the jury a special neutralizing instruction.

As the majority correctly points out, it is impermissible to knowingly call a witness to the stand who will claim a privilege. The reason for this prohibition on both the State and the defendant is that the witness' refusal to testify on a claim of privilege, in and of itself, has no real probative significance in the determination of defendant's guilt or innocence. Further, the witness' refusal to testify could be based upon considerations wholly unrelated to the crime at issue, but could have a disproportionate impact upon the minds of the jurors and create the impression that the witness is guilty of the crime.[1] Thus, we preclude such action to prevent undue weight that may be given by a juror to the claim of privilege and due to the impossibility of cross-examination as to its assertion. *State v. Day*, 400 So.2d 622, 624 (La. 1981). Accordingly, once a witness has appeared in court and refuses to testify, the defendant's Sixth Amendment rights are satisfied and the trial court was under no obligation to grant defendant's request to place the witness on the stand to invoke the privilege in the presence of the jury.

For the same reasons, I believe the trial court correctly refused to give a special neutralizing instruction. By requiring a neutralizing instruction, the majority is allowing the

1. That such testimony can lead to a disproportionate impact upon the minds of the jurors and create the impression that the witness is guilty of the crime is seen in this case by the results of defendant's first trial.

defendant, in essence, to accomplish indirectly that which we have repeatedly held could not be done directly, *i.e.*, an attempt to substantially put before the jury information that a witness has invoked his Fifth Amendment privilege to testify. Nothing in the proposed neutralizing instruction prevents speculation on the part of the jury. Instead, by highlighting the absence of this witness, the instruction alerts the jurors to this omission and fosters the speculation that the majority attempts to remedy. I believe by omitting a specific reference to a witness who has invoked his Fifth Amendment privilege and giving the general instruction of the law, the trial court averted any unwarranted and harmful speculation by the jurors that the witness is guilty of the alleged crime. *See, e.g., United States v. Griffin*, 66 F.3d 68, 71 (5th Cir. 1995); *Commonwealth v. Gagnon*, 408 Mass. 185, 557 N.E.2d 728, 737 (Mass. 1990); *People v. Thomas*, 51 N.Y.2d 466, 434 N.Y.S.2d 941, 415 N.E.2d 931, 934-95 (N.Y. 1980); and cases cited in each. The United States Court of Appeals for the Fifth Circuit has stated in refusing to allow just such a "neutralizing instruction," " 'neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege.' " *Griffin*, 66 F.3d at 71 (quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973)).

Furthermore, even assuming *arguendo* that such an instruction should have been given, the refusal on the part of the trial court was harmless error. The harmless error rule test whether the guilty verdict actually rendered in the case was surely unattributable to the alleged error. The test is not, however, whether a guilty verdict would surely have been rendered in a trial without the alleged error. *Sullivan v.*

Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The jury clearly found Sergeant Buckley's testimony credible and based its verdict of guilty on that testimony. Given the testimony and the trial court's instruction, the guilty verdict rendered in this particular trial is surely not attributable to the trial court's refusal to give a neutralizing instruction. *Id.*

APPENDIX B — ORDER OF DENIAL OF REHEARING OF THE LOUISIANA SUPREME COURT DATED MAY 5, 2000

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE #032

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the ***5th day of May, 2000***, the following action was taken by the Supreme Court of Louisiana in the case (s) listed below:

REHEARING (S) DENIED:

1999-K - 1272 STATE OF LOUISIANA v. ANWAR HADDAD SENTENCED AS ("ANWAR G. HADDAD") (Parish of Jefferson)

VICTORY, J., not on panel.

LEMMON, J., concurs in the denial of rehearing and assigns reasons.

KIMBALL, J., concurs in the denial of rehearing and assigns reasons.

TRAYLOR, J., would grant a rehearing.

KNOLL, J., would grant a rehearing.

Appendix B

SUPREME COURT OF LOUISIANA

No. 99-K-1272

STATE OF LOUISIANA

Versus

ANWAR HADDAD (SENTENCED AS "ANWAR G. HADDAD")

LEMON, J., Concurring in the Denial of the Application for Rehearing

On application for rehearing, the State argues that the trial court properly refused defense counsel's request for an instruction informing the jury that the defense had called the eyewitness and that the witness was not permitted to testify because of a court ruling. The State's characterization of defense counsel's request is correct, as far as it goes, but is not persuasive when the request is considered in its entirety.

Prior to trial, the court properly ruled that the witness would not be required to invoke the Fifth Amendment in front of the jury. Defense counsel, both prior to trial and during trial, argued that because the witness was defendant's friend and was a companion in the car, the jury would draw an adverse inference from the witness' failure to testify unless the jury was informed there was a reason for the witness' absence. While defense counsel could have articulated the request more precisely (or could have filed a written request

for a specific neutralizing instruction), counsel clearly alerted the trial judge to counsel's legitimate fear of the jury's drawing an adverse inference in the absence of any instruction by the court. Thus counsel implicitly requested the court to instruct the jury not to draw an adverse interest, against either party, from the witness' failure to testify.

Under these circumstances, the majority correctly decided that the trial erred in failing to provide any instruction to the jury regarding the witness' failure to testify.

Appendix B

SUPREME COURT OF LOUISIANA

No. 99-K-1272

STATE OF LOUISIANA

v.

ANWAR HADDAD (SENTENCED AS "ANWAR G. HADDAD")

KIMBALL, Justice, concurring in the denial of rehearing

In its application for rehearing, the State argues that "the jury would not have been instructed against drawing inferences from the witness's absence" because the instruction requested by the defense failed to indicate that the jury could not draw any inferences from the witness's failure to testify. The opinion makes it clear, however, that the neutralizing instruction required in this case should have informed the jurors that they could draw no inferences from the witness's failure to testify. Moreover, the opinion cannot be read to require that the jurors be told that it was the defendant, rather than the State, who would have called the witness to testify at trial. Because the opinion adequately resolves the issue presented in this case, I concur in the majority's denial of rehearing.

APPENDIX C — OPINION OF THE LOUISIANA FIFTH CIRCUIT COURT OF APPEAL DATED MARCH 30, 1999

NO. 98-KA-1200

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

ANWAR HADDAD SENTENCED AS
("ANWAR G. HADDAD")

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT
COURT PARISH OF JEFFERSON,
STATE OF LOUISIANA

NO. 98-762, DIVISION "I"

THE HONORABLE JO ELLEN GRANT,
JUDGE PRESIDING

MARCH 30, 1999

SOL GOTHARD JUDGE

Panel composed of Judges Sol Gothard,
Thomas F. Daley And Marion F. Edwards.

* * *

Appendix C

Defendant, Anwar Haddad, was convicted of being a convicted felon in possession of a firearm in violation of LSA-R.S. 14:95.1, and sentenced accordingly. He appeals the conviction and sentence to this court. The record shows that on February 21, 1998, the Jefferson Parish District Attorney filed a bill of information charging defendant, Anwar Haddad, with one count of possession of a firearm by a convicted felon. On March 20, 1998, defendant was arraigned, and pled not guilty. On April 21, 1998, the district attorney filed an amended bill of information, adding a second count of possession of a firearm by a convicted felon. Defendant was arraigned on April 24, 1998 as to the amended bill, and pled not guilty.

Defendant was tried before a jury of twelve on May 21, 1998. The jury was deadlocked and unable to reach a verdict on count one; but, returned a verdict of not guilty as to count two. Defendant was retried as to count one on June 24, 1998, and the jury found him guilty as charged. Defendant filed a motion for new trial on August 13, 1998, and the motion was heard and denied on that day. Defendant thereafter waived statutory delays and was sentenced to serve ten years at hard labor, without benefit of parole, probation, or suspension of sentence. On that day, defendant entered both an oral and a written motion for appeal.

FACTS

At 12:39 p.m. on April 29, 1997, Sergeant Brady Buckley of the Jefferson Parish Sheriff's Office was on routine patrol in Metairie, driving a marked police unit. While traveling north on North Causeway Boulevard, he saw

a vehicle heading in the wrong direction on a one-way exit ramp to the I-10 Service Road. The vehicle made a U-turn in front of Buckley's car, and proceeded north on North Causeway at a high rate of speed. The officer pursued the vehicle with the intention of ticketing the driver for speeding and driving the wrong way on a one-way street.

The vehicle slowed as it approached the overpass at Veterans Boulevard, but began to make erratic lane changes. Buckley activated his police lights and siren, but the vehicle did not stop immediately. Instead, it crossed three lanes of traffic and turned into the parking lot at Lakeside Shopping Center. The vehicle then slowly traveled another two hundred to three hundred yards before stopping. Buckley noted there were two men in the vehicle. The driver, later identified as Lionel Smith, exited immediately. The officer ordered the man to walk toward him.

When Smith reached the police unit, he volunteered that he had no driver's license or identification. Smith stated that the car he was driving belonged to his girlfriend, and that he did not know where the registration was. Buckley and Smith approached the car to look for registration papers. Defendant Anwar Haddad, who was seated in the passenger seat, pulled a black handgun from his waistband and pointed it at Buckley. The officer drew his weapon and ordered defendant to "freeze." Defendant dropped the gun onto the floorboard of the vehicle. In compliance with police procedure, Buckley used Smith as a "human shield," and made his way backwards to the safety of the police unit.

Buckley handcuffed Smith and placed him in the back seat of the police car. The officer ordered defendant to exit the vehicle and lie face down on the ground. Defendant complied, and the officer handcuffed him. Buckley retrieved a loaded .380 Lorcin semi-automatic handgun from inside the vehicle. The officer found the gun was listed as stolen on the police computer.

Buckley advised the two men they were under arrest. A search using the police computer revealed Smith had outstanding attachments in Kenner. The officer also learned defendant had prior convictions, and charged him with possession of a firearm by a convicted felon.[1] Buckley issued Smith three traffic citations.

Samir Haddad, defendant's brother, testified on his behalf. Samir stated the .380 Lorcin was his, and that he used it for his own protection when working at the family's supermarket. He further testified that the car driven by Smith belonged to his (Samir's) girlfriend, Andrea. According to Samir, he rode in the car the night before defendant's arrest, and inadvertently left the gun under the seat. Samir stated defendant has never used the gun. Issa and Lucy Haddad, defendant's parents, also testified at trial that the gun belonged to Samir, and that they had never seen it in defendant's possession.

Defendant testified that Lionel Smith picked him up on the morning of April 29, 1997, in a vehicle belonging to

1. At trial, the parties stipulated to the admission of State's Exhibit 1, a certified copy of defendant's 1997 conviction for attempted unauthorized entry of an inhabited dwelling, which the state offered as the predicate felony under LSA-R.S. 14:95.1.

Samir's girlfriend. The men ran errands together for about two hours before they were stopped by Sergeant Buckley. When Smith stopped the car, he tossed the gun to defendant and advised him to run. Defendant testified that he knew it was illegal for him to possess a weapon, so he placed the gun beside his leg. Defendant stated that he notified Buckley there was a gun in the car, and that the officer then left him in the car with the gun until he had handcuffed Smith.

In brief to this court, defendant assigns one error. He maintains the trial court committed reversible error when it failed to give a "neutralizing" instruction to the jury regarding the failure of a witness to testify at trial following a ruling by the court that the witness would not be allowed to testify because that witness had invoked his Fifth Amendment privilege against self-incrimination. Defendant's argument in this regard relates to the fact that witness, Lionel Smith, invoked his Fifth Amendment privilege against self-incrimination out of the jury's presence, and did not testify at trial.

On June 24, 1998, prior to jury selection, Lionel Smith was sworn in open court. Smith's attorney stated for the record that his client had decided to invoke his Fifth Amendment privilege against self-incrimination. The court then excused Smith, determining that it would be unnecessary for the witness to reassert his Fifth Amendment privilege in the jury's presence. Defendant's attorney objected, arguing that his case would rest primarily on the assertion that it was Smith who possessed the gun at issue, and that defendant would be prejudiced if jurors were allowed to speculate as to why Smith was not called to testify. The court noted defendant's objection.

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At trial defense counsel reasserted his objection arguing that, because several witnesses had made mention of Smith's involvement in events leading up to his arrest, jurors would be left to speculate as to why defendant did not call him as a witness. Counsel asserted defendant was entitled to an instruction which would neutralize any inference jurors might draw from his failure to produce Smith at trial. The court again noted the objection, but reserved its ruling on the matter. After the defense rested its case, the judge ruled that she would give no instruction regarding Lionel Smith's failure to testify.

Defendant concedes that the trial court properly allowed Smith to invoke his Fifth Amendment privilege out of the jury's presence. The jurisprudence indeed favors the determination of claims of privilege outside the jury's presence, considering the undue weight a jury might give such a claim. In *State v. Wille*, 559 So.2d 1321, 1337-1338 (La. 1990), the court stated:

> This court has recognized that it is error to allow the prosecutor to call before the jury a witness who he knows will invoke the privilege against self incrimination, when there is no other purpose for calling the witness except to have the jury draw evidentiary inferences from the fact that the witness claimed the privilege.

See also, *State v. Berry*, 324 So.2d 822, 830 (La. 1975), *cert. denied*, 425 U.S. 954, 96 S.Ct. 1731, 48 L.Ed.2d 198 (1976); *State v. Gerard*, 96-366 p. 5 (La.App. 5 Cir. 11/14/96), 685 So.2d 253, 258.

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The United States Supreme Court has established that the Fifth Amendment requires, upon proper request, that a trial judge instruct the jury that no adverse inference can be drawn from a *defendant's* failure to testify. *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). However, there is little jurisprudence in support of defendant's contention that it is reversible error for a trial court to refuse a defendant's request for an instruction explaining a witness's failure to testify.

In support of his argument, defendant cites federal cases in which the reviewing courts approved of such a neutralizing instruction. In *Bowles v. United States*, 439 F.2d 536 (D.C.Cir. 1970), *cert. denied*, 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533 (1971), the defendant was prevented from calling a witness to the stand because the witness intended to invoke his Fifth Amendment privilege. On review, the court found the defendant was entitled to request an instruction that the jury should draw no inference from the absence of the witness because he was not available to either side. The court further found that, had either party made such a request, it would have been error for the trial court to refuse it. *Id.* 439 F.2d at 542.

In *United States v. Martin*, 526 F.2d 485 (10th Cir. 1975), the defendant challenged the trial court's decision to prevent the defendant from putting a confidential informant on the stand to compel him to invoke his Fifth Amendment Privilege in the jury's presence. On review, the court found the trial court acted properly in giving a "neutralizing" instruction sufficient to put the matter in context. There are no recent federal cases which directly address this issue.

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Neither the Louisiana Supreme Court, nor this court has directly addressed the question raised here. In *State v. Gerard, supra*, the defendant argued that the trial judge erred in failing to instruct the jury as to the relevance of a codefendant's invocation of his Fifth Amendment privilege. However, this court did not review the issue, as it was not properly briefed.

In the instant case, the testimony of Sergeant Buckley showed Lionel Smith was closely involved in the events leading up to defendant's arrest. Moreover, the main thrust of the defense is that it was Smith who initially possessed the weapon. Defendant argues that failure of the defendant to call Smith to the stand at trial, without an explanation of why he was absent, caused jurors to form negative inferences regarding defendant.

C.Cr.P. article 802 provides that the scope of the general charge given to the jury shall be as follows:

(1) As to the law applicable to the case;

(2) That the jury is the judge of the law and of the facts on the question of guilt or innocence, but that it has the duty to accept and to apply the law as given by the court; and

(3) That the jury alone shall determine the weight and credibility of the evidence.

State v. Crossley, 94-965 (La.App. 5 Cir. 3/15/95), 653 So.2d 631, 635-636.

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C.Cr.P. article 807 provides that in addition to the general charges, a defendant may request special jury charges. That article requires that such requested charges must be given by the court "if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given". In the general charge the trial court stated:

> You must determine the facts only from the evidence presented. The evidence which you should consider consists of the testimony of witnesses and any other evidence which the Court has permitted the parties to introduce.
>
> * * * * * *
>
> You are not bound to decide any issue of fact in accordance with the number of witnesses presented on that point. Witnesses are weighed and not counted. The test is not which side brings the greater number of witnesses before you, or presents the greater quantity of evidence, but rather which witnesses and which evidence appeals to your minds as being the most convincing.
>
> * * * * * *
>
> The defendant is not required by law to call any witnesses or produce any evidence.

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Although the special charge was not specifically included in the general charge, read as a whole the instructions adequately inform the members of the jury that they are to consider only the evidence presented. Even assuming arguendo that the trial court erred in failing to give the requested charge, the error is harmless.

An erroneous jury instruction is subject to harmless error review. *State v. Jynes*, 94-745 (La.App. 5 Cir. 3/1/95), 652 So.2d 91, 98. The appropriate standard for determining harmless error is " 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the instant trial was surely unattributable to the error.' " *State v. James*, 95-566, p. 4 (La.App. 5 Cir. 11/28/95), 665 So.2d 581, 584, citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

In *Richardson v. Lucas*, 741 F.2d 753 (5th Cir. 1984), the court found the trial court committed harmless error in refusing, following a proper request, to instruct the jury not to draw an unfavorable inference from the defendant's refusal to testify. The court concluded there was no reasonable possibility that such an instruction would have affected the verdict.

In the instant case, Sergeant Buckley testified that he saw defendant take the gun from his waistband and point it at him. The jury apparently found the officer's testimony credible and based its verdict of guilty on that testimony. Accordingly, the outcome of the case was not attributable to the trial court's refusal to give a "neutralizing" instruction. We find no merit in the defendant's assignment of error.

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We note on an errors patent review that the defendant's sentence is illegally lenient in that it does not impose a fine as required pursuant to LSA-R.S. 14:95.1 B. However, since the state has not raised the issue this court may not set aside the sentence. *State v. Fraser*, 484 So.2d 122 (La. 1986).

For the foregoing reasons, we affirm defendant's conviction and sentence.

AFFIRMED

APPENDIX D — PERTINENT PORTIONS OF TRIAL TRANSCRIPT

PRE-TRIAL:

LIONEL SMITH, 2412 Taffy Drive, Kenner, Louisiana, was called as a witness, and after having been first duly sworn, was examined and testified on his oath, as follows:

* * *

THE COURT:

All right. Based upon Mr. Beevers' statement that Mr. Smith is going to take the Fifth Amendment, I am going to excuse this witness. I'm going to go ahead and call up the jury in this case. I have checked the law, and I don't believe I have to allow him to do this in front of the jury, so I'm going to send him back; and we thank you for bringing him.

MR. DIROSA:

Judge, let me object, for the record.

THE COURT:

Just get by the microphone.

MR. DIROSA:

Let me object, for the record, to the ruling of the Court. I think that the problem this creates for my client is that there are only three people that are on the scene, two people in the car; there's one gun at issue, and my client's defense

is based on the fact that Mr. Smith was the one in possession of that gun, and I think this creates a question in the jury's mind as to why my client has refused to call the other person who he was in the car with, and I think the implication from that may be that that person could not substantiate the story that my client gives. So I think that seriously creates a problem and denies me of — or my client of the due process right of calling the witnesses that he thinks are necessary in his defense.

* * *

DURING CROSS-EXAMINATION OF SAMIR HADDAD:

MR. DIROSA:

I know you didn't say Lionel, but Lionel's obviously in the car, and this brings up the same problem that I said before. I think somehow the jury has to understand that we subpoenaed and had Lionel over here to testify, and that, due to a ruling of the Court, he was unable to testify today, because, obviously, they're going to be left with the implication, "Well, what — why not? Why wasn't he called?" * * *

* * *

Appendix D

(Discussing Jury Instructions)

* * *

MR. DIROSA:

Okay. And — oh, once again, I'm going to ask, since I don't think you ever ruled on that motion that we would inform them that Lionel Smith had been called and that, through a ruling of the court, he would not be permitted to testify, or something to that effect —

THE COURT:

Okay. No, I'm not.

* * * *